

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) MM Docket No. 93-17
)
Amendment of Section 73.202(b),) RM-8170
Table of Allotments,)
FM Broadcast Stations,)
(Rosendale, New York))

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To: The Commission

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OPPOSITION TO APPLICATION FOR REVIEW

Aritaur Communications, Inc. ("Aritaur"), by and through counsel, and pursuant to §1.115 of the Commission's Rules (47 C.F.R. §1.115), hereby submits its Opposition to the "Application for Review" filed by State University of New York ("SUNY") to the Memorandum Opinion and Order, DA 96-376, released March 28, 1996, ("MO&O"), in the above-captioned proceeding.¹ In support whereof, the following is shown:

Standing

1. SUNY is seeking a review of the decision of the Commission's Policy and Rules Division ("PRD") which denied reconsideration of the allotment of a new FM station on Channel 273A at Rosendale, New York, and the opening of a window for the filing of applications for the new FM station. SUNY is an applicant (File No. BPED-960111MF) for construction permit for the new FM station at Rosendale. Aritaur is also an applicant (File No. BPH-960111MR) for

¹ This opposition is timely filed pursuant to §1.4(b) and §1.115 of the Commission's Rules within 10 days of the filing of the Application for Review (including three additional days for mailing time and not counting "holidays") or by May 8, 1996.

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the new Rosendale station. If the Commission grants SUNY's Application for Review, the Commission will rescind the previous Report and Order, 10 FCC Rcd 11471 (1995) ("Report and Order") allotting the new Rosendale station and dismiss Aritaur's pending application. If such action is taken, Aritaur will suffer irreparable, measurable harm. Aritaur is without question a "party in interest" within the meaning of §309(d) of the Communications Act of 1934, as amended, and has standing to oppose SUNY's Application for Review. See, FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1970).

Background

2. SUNY is the licensee of noncommercial FM station WFNP, Rosendale, New York operating on reserved band Channel 204A. WFNP currently shares Channel 204A with another noncommercial broadcaster, WRHV, Poughkeepsie, New York, through a timesharing arrangement. In an effort to obtain its own full-time noncommercial FM station, SUNY filed a Petition for Rulemaking requesting that the Commission modify the license of WFNP to operate on nonreserved FM Channel 273A at Rosendale. Ordinarily, a channel change of the type proposed by SUNY to a new non-adjacent channel would have been subject to outside expressions of interest. SUNY argued that its proposed channel change should be protected from outside expressions of interest under §1.420(g) of the Rules.

3. In its Notice of Proposed Rulemaking, 8 FCC Rcd 947 (1993), in this proceeding, the Commission sought a clarification from SUNY as to whether SUNY desired the Commission to designate Channel 273A a noncommercial allotment. This clarification was necessary because Channel 273A was a nonreserved band channel and SUNY had not specifically requested that the channel be reserved for noncommercial use. In response to the Commission's inquiry, **SUNY stated in its comments that it did not want Channel 273A reserved for noncommercial use.** See, R&O at fn 5. Since SUNY specifically stated that it did not want Channel 273A to be reserved for noncommercial use, the Commission allotted Channel 273A to Rosendale, opened a filing window for the new channel and denied SUNY's proposed channel change for WFNP. In its Report and Order, the PRD explained that it could not make the channel change requested by SUNY since SUNY did not specifically request that Channel 273A be reserved for noncommercial use. The PRD found that §1.420(g) of the Rules does not apply to stations seeking to switch from a reserved band channel to a nonreserved band channel. In addition, the PRD found that SUNY's proposed channel change was contrary to the Commission's policy of not assigning noncommercial educational FM stations to nonreserved band channels in the absence of TV Channel 6 interference or preclusion by a foreign allotment. The PRD allotted Channel 273A to Rosendale and opened a filing window. Aritaur

was among several parties that submitted applications for the new Rosendale facility.²

4. SUNY filed a Petition for Reconsideration of the Report and Order allotting the new FM station to Rosendale. Aritaur timely opposed SUNY's Petition. In its MO&O, the PRD denied reconsideration finding that its "action not modifying the license of...WFNP to a channel in the commercial band was consistent with Section 1.420(g) of the Rules." MO&O at ¶6.

**The PRD's Decision to Open a Filing Window
For Channel 273A at Rosendale, New York,
Was Based on Precedent and Should be Affirmed**

5. In its Application for Review, SUNY merely reargues the same matters it raised in its Petition for Reconsideration. SUNY once again contends that modification of the WFNP license to Channel 273A without the opening of a new FM window for that channel was permissible under §1.420(g). The PRD thoroughly reviewed this argument and properly rejected it. The PRD found that the special modification provision in the Rule does not apply to stations seeking to switch from a reserved band channel to a nonreserved band channel. SUNY once again contends that the language of §1.420(g) does not state that reserved band

² The other applicants are: Rosen Broadcasters, Inc. (File No. BPH-960111AT); Sacred Heart University, Inc. (File No. BPED-960111AZ); Marist College (File No. BPED-960111BA); Eric P. Straus (File No. BPH-960111MK); Radio Rosendale (File No. BPH-960111ML); David Fleisher and Melissa Krantz (File No. BPH-960111MM); Hawkeye Communications, Inc. (File No. BPH-960111MN); Span Communications Corp. (File No. BPH-960111MQ); and SUNY.

licensees are exempt from seeking to modify their stations' licenses to a nonreserved band channel. SUNY claims that if the Commission meant to exempt such modifications, it should have provided specific language in §1.420(g) to that effect. However, the Commission, in its Report and Order in MM Docket No. 83-1148, FCC 84-358, released July 26, 1984 [56 RR 2d 1253], adopting §1.420(g) of the Rules, specifically considered whether to permit such modifications, and found the issue to be outside the scope of the proceeding. Had it desired to permit FM licensees to modify without competing expressions of interest their station's licenses from a reserved band to a nonreserved channel, the Commission could have specifically stated its intent in its Report and Order adopting the new Rule. Finding the issue outside the scope of the proceeding, the Commission effectively restricted the use of §1.420(g) of the Rules to nonreserved band channel modifications. To permit the modification proposed by SUNY would be contrary to the Commission's policy.

6. SUNY once again argues that the PRD's decision was contrary to precedent, citing the PRD's decision in FM Table of Allotments (Sioux Falls, SD), 51 FR 4169, released February 3, 1986. While in that case a noncommercial station was permitted to modify its license to a new nonreserved band channel, the PRD noted that its decision was based upon unique circumstances that do not exist here. The decision to permit the licensee in the Sioux Falls, SD case to modify its station's license was made to correct an error on the PRD's part. The PRD had

misinterpreted the desire of a noncommercial station, KCFS, to provide Sioux Falls, South Dakota, with two noncommercial services on Channel 215A and Channel 211A. The PRD mistakenly deleted Channel 211A. KCFS had already filed an application for Channel 211A and that application had achieved cut-off protection. To correct its error, the PRD proposed to allot nonreserved band Channel 261A and modify the license of Station KCFS for operation on Channel 261A. None of the unique circumstances that existed in that case are present in SUNY's case. The PRD was not seeking to remedy a past error and no special action was warranted. SUNY has failed to show why it should be afforded special consideration, or how the facts of this case are unique and warrant a different result.

7. Furthermore, in the Sioux Falls, SD case, the PRD found that there would be no harm to the public interest by permitting the noncommercial station to modify from a reserved band channel to a nonreserved band, since Sioux Falls would continue to receive local service from four noncommercial stations. The PRD was not concerned that its action would result in the removal of the community's sole local noncommercial educational service. In this case, WFNP provides the only local noncommercial service to Rosendale. The PRD found that permitting the modification proposed by SUNY could result in the loss of Rosendale's sole noncommercial educational service since SUNY could assign the license of the station to another entity to be operated on a commercial basis.

SUNY argues that Rosendale receives noncommercial service from other stations, however, as none of those stations is licensed to Rosendale, they are not required to provide local service to that community.

8. The PRD additionally refused to grant SUNY's request because the Commission permits noncommercial FM stations to modify their licenses to operate on a nonreserved band channel reserved for noncommercial use only in those cases where it is demonstrated that no reserved band channel is available because of either: (a) foreign spacing constraints or (b) potential interference to TV Channel 6 operations. In this case, there was no channel within the reserved FM band for use by WFNP because of **domestic**, not foreign, spacing constraints and not because of TV Channel 6 interference problems. Therefore, even if SUNY had requested that Channel 273A be reserved for use as a noncommercial channel, the PRD would have denied its proposal as contrary to Commission precedent. See, R&Q at ¶2, citing, FM Table of Allotments (Siloam Springs, Arkansas), 2 FCC Rcd 7485 (1987), aff'd, 4 FCC Rcd 4920 (1989), and FM Table of Allotments (Bulls Gap, Tennessee), 10 FCC Rcd 10444 (1995). SUNY argues that it would have addressed this problem if it had only known that PRD was going to reject its proposal. However, SUNY was not allowed to simply sit back hoping that the PRD would grant its proposal and, when its proposal was denied, respond with an offer of additional proof of what it would have done had it

known the ultimate outcome of the proceeding. As the Court of Appeals has stated:

"Certainly, [we] cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." Colorado Radio Corporation v. FCC, 118 F.2d 24 (1941).

SUNY's hindsight arguments cannot serve to overturn the PRD's decision which was based on Commission precedent of which SUNY should have been aware at the time it filed its proposal.

9. SUNY repeats its argument that the decision in this case has deprived the public of the benefits of its proposal. Contrary to SUNY's belief, the public is better served by the allotment of a new FM Channel 273A at Rosendale that will provide new FM service at Rosendale while retaining that community's only noncommercial station. SUNY is not foreclosed from the opportunity to have its own local station. At the comparative hearing to identify a permittee SUNY will have an opportunity to demonstrate why it believes its proposal is superior to its competitors. Such an outcome is superior to SUNY's proposal which could result in the loss of noncommercial service and which would benefit only SUNY's personal interest and not the interests of the general public.

Conclusion

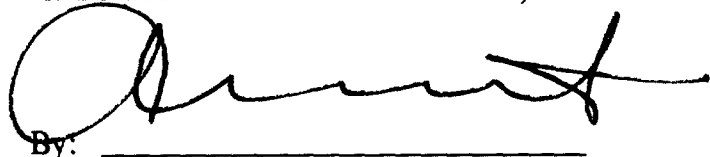
10. SUNY has utterly failed to demonstrate any error in the PRD's denying reconsideration of the Report and Order allotting Channel 273A at

Rosendale, New York, and opening a filing window for the new allotment. The PRD's action was fully supported by precedent and will serve the public interest. SUNY's proposal was properly denied as contrary to the intent of §1.420(g) of the Rules. Even if SUNY had requested that Channel 273A at Rosendale be reserved for noncommercial use, its proposal would still have been denied as contrary to Commission precedent. SUNY makes no argument whatsoever to support rescission of the PRD's MO&O in this proceeding. Its Application for Review should be promptly denied.

WHEREFORE, the above-premises considered, Aritaur Communications, Inc. respectfully requests that the Application for Review filed by State University of New York be **DENIED**.

Respectfully submitted,

ARITAU COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read 'Gary S. Smithwick', written over a horizontal line.

By: _____

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May 8, 1996

ROSENDAL/PN/OPPAPP.REV

CERTIFICATE OF SERVICE

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